IN THE

United States Court of Appeals

For the Ninth Circuit

No. 14,804

PEGGY RAY WALKER KINGSTON,

Appellant,

vs.

M. S. McGRATH,

Appellee.

APPELLEE'S BRIEF

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NATURE OF CASE

This action was brought in the name of Peggy Ray Walker against appellee, M. S. McGrath, a physician and surgeon residing and practicing his profession in Weiser, Washington County, Idaho; Washington County, Idaho and City of Weiser, a municipal corporation, jointly conducting business as the Weiser Memorial Hospital at Weiser, Idaho; Dr. Norman Bolker, licensed physician specializing in radiology at Nampa, Idaho; and Dr. Judson B. Morris, a licensed physician specializing in radiology and roentgenology.

The trial commenced on March 8, 1955 against

all of the defendants except Dr. Bolker who was at that time in the military service of the United States. At the conclusion of all of plaintiff's evidence the court sustained motions to dismiss as to the defendants, Dr. McGrath and Dr. Morris. (T-453) This appeal is presented to this court as to the defendant and appellee, Dr. M. S. McGrath, only.

STATEMENT OF THE FACTS

We are unable to accept the statement of the case as presented by the appellant for the reason that it is not only incomplete and inadequate as a fair statement of the case made by the appellant but is more of an argument than a statement of facts.

We deem it essential to a proper understanding and decision of this case to make a rather full statement and analysis of the evidence, particularly the medical testimony presented by the appellant, because if the appellant is to prevail the reason must be found in the medical testimony presented by the appellant at the trial.

THE EVIDENCE

The appellant identified herself as Mrs. Peggy Ray Kingston, a married woman of forty-seven (47) years of age, residing at Merced, California. She came to Council, Idaho for a vacation as the guest of one Jackson Soden on Monday night, October 13, 1952. (T-39). She stayed at Council until Sunday morning, October 19, 1952, and left the latter place in an automobile in which three others

were riding. The party left approximately around eight o'clock A. M. (T-40), but the appellant did not remember going through Weiser (T-41) nor did she know the kind of an automobile in which she was riding (T-42).

Some distance south and east of Weiser the car in which appellant was riding left the highway, turned over and came to rest out in a field (T-42) and as a result the appellant was thrown out of the car and was rendered unconscious, and in addition sustained injuries to her fifth and sixth ribs on the left side and injuries to the cervical and thoracic spine.

Appellant was taken to the Weiser Memorial Hospital by ambulance and placed in the x-ray room by the appellee, Dr. McGrath, and at the time she was suffering severe pain.

> "A. Well, the worst pain was my neck. That was the worst pain I had, and if I tried to sit up at all my chest, I couldn't breathe."
>
> "Q. Were there cuts and bruises about your body, or ribs, or any place?"
>
> "A. My left leg was bruised, and my hand, my left hand." (T-45).

Dr. McGrath suggested putting a neck brace upon the appellant to relieve the tension and pain.

> A. "He told me he had worn one once, and why didn't I try that. Of course, it hurt me so bad all I did was scream and scream, not to hurt my head

any more—move my head any more."

Q. "When you protested he didn't put it on; is that correct?"

A. "No."

Q. "Did he ever suggest it again while you were in the hospital?"

A. "No, that was the only time * * * (T-47).

Some four or five days following the admission of appellant into the hospital she commenced having hallucinations and lapsing into a delirious condition.

Q. "Now after you were there for a period, we will say four or five days, or whatever it was, did anything of an unusual nature happen?"

A. "Well, I sort of went out of my mind. I am not sure—I think it was Wednesday or Thursday." * * * *

Q. "Will you tell us generally what you recall during this particular period?"

A. "Of taking my bag and breaking the window and stepping out on the grass, and Doctor McGrath bandaging my hand, and being very gentle with my feet, so not to cut my feet on that grass because I was going to be—getting help is what I was groping for, and I believe that was a Thursday, and I remember Saturday morning before eight o'clock, thinking, 'Oh, where am I?' The nurse said, 'You are in a hospital,' and I said, 'What hospital?' And she said, 'You are in Weiser', and I said, 'I am still here in Weiser Hospital?' She then said, 'Yes,' and from there on I

wasn't in shock again, I——" (T-50).

About two and a half weeks after the appellant was in the hospital, she was placed in what she referred to as "hypotension". This was after additional xrays had been taken and the sixth thoracic vertebra was found to be compressed. (T-59) Also at this time a back brace was made and fitted to appellant and a short time thereafter, Dr. Burton, an orthopedic surgeon of Boise, Idaho, was called, and he placed the appellant in a body cast. (T-64)

Thereafter, (December 5, 1952) the appellant was placed on the train and taken to San Francisco via Portland where she was admitted to the Notre Dame Hospital under the service of her family doctor, James Clifford Long, (T-68) and Dr. John J. Loutzenheiser, an orthopedic surgeon. (T-69)

At the Notre Dame Hospital she was xrayed, and the first thing Dr. Loutzenheiser did was to place appellant's head and neck in a cast, "so my neck wouldn't go up or down or over to the sides or move". (T-70)

Dr. Loutzenheiser also had made for the appellant a back brace which she wore when she got up and walked.

"Q. "For approximately how long after you left the hospital did you continue to wear these braces or apparatus that you described?"

A. "Well, I wore the—I wore the neck brace for a long time. The back brace—after about

two months Dr. Loutzenheiser said that they couldn't seem to get anything that didn't hurt me terribly with it, and to try and just wear it when I went out, and if I couldn't go out—of course, I had to wear it in the taxi to and from the doctor's office, to try and lie down most of the time, and only put it on for ten of fifteen minutes, and see if I could stand the pain of it."

Q. "Well, for how long altogether approximately did you wear these braces or either of them?"

A. "Well, I think this back brace probably about two and a half or three months, and then the neck—the collar thing, I finally got after about four or five months that if I laid still during the day or walked very carefully so I wouldn't jar myself I only had to wear it at night, and I wore it at night for another, I guess three or four months, just to sleep in." (T-71)

The foregoing evidence was elicited on the direct examination of the appellant, and on cross-examination the following was added.

The body cast which Dr. Burton placed on the appellant was removed by Dr. Loutzenheiser who placed the patient in a back body brace, which apparently was the same kind of a brace as the appellant had had at the hands of Dr. McGrath, save and except that it did not extend as high on the shoulders and it laced somewhat differently in front. (T-85-87)

In the appellant's discussion of the neck brace

which Dr. McGrath tried to put on her, she refused to permit Dr. McGrath to do so and finally stated, "He didn't get it on me, let's put it that way." (T-87)

At the Notre Dame Hospital under the service of Dr. Loutzenheiser, the latter "did put a collar and an extension on your neck?"

A. "I should say so."

Q. "Did he ask you or did he tell you?"

A. "He had already known I had a broken neck."

Q. "Please answer my question. Did Dr. Loutzenheiser ask you if you would consent to that or did he tell you he couldn't do it?"

A. "He just did, I don't think he asked me or told me." (T-88)

With reference to the statement of Dr. McGrath's that the delirium and hallucinations which the appellant developed and suffered commenced four or five days after her injury was in fact delirium tremens, the appellant testified (T-93) that she did not keep track of the liquor she consumed at Council.

"A. "When you are supposed to be enjoying yourself you don't count them." * * *

Q. "You would drink there and stay in those bars until one o'clock in the morning when they closed?"

A. "Not every night, Saturday night I did." * *

Q. "And that was the last day of your vacation and celebration?"

A. "Yes."

With reference to the hallucinations the appellant testified:

"A. "Water bugs is the only thing I can remember, when I would go to the bathroom I could see on the floor." * * *

Q. "And you saw people and talked to people that were not there?"

A. "No."

Q. "You don't remember that, or do you?"

A. "I thought people outside the window were trying to help me." (T-97) Appellant further stated that this was the only experience she had had of such a nature.

"Q. "You haven't had before or since such a severe injury as you received in that automobile accident, have you?"

A. "No." (T-98)

On cross-examination the following appears:

"Q. "Now are you telling the jury that a cocktail or two before dinner and five drinks of whiskey after dinner did not make you intoxicated?"

A. "No, I don't believe it bothered me because I was on a vacation. I could sleep late every morning, stay in bed as long as I wanted to." (T-107)

Thomas A. Breshears was the next witness called by the appellant and identified himself as the Manager or Administrator of the Weiser Memorial

Hospital. This witness was not connected with the hospital at the time the appellant was a patient but by stipulation, while the witness was on the witness stand, the hospital record and the xray films taken at the hospital together with the radiologist's reports were marked for identification. (T-110)

Dr. M. S. McGrath, the appellee in this case, was called by the appellant under Rule 43(B), and was subjected to a searching examination covering every detail of his training, experience and care of the appellant, and his testimony covers 172 pages of the transcript, being pages 111 to 283 inclusive.

Inasmuch as this appeal hinges around Dr. McGrath, we feel it not only proper but in order and helpful to substantially review the doctor's testimony. He has carried on a general practice of medicine in Weiser, Idaho, and the vicinity thereof for seventeen years. The five doctors residing in the vicinity of Weiser make up what they refer to as members of the hospital staff. (T-113) No specialists reside at Weiser, and the closest orthopedic surgeon is in Boise, Idaho, eighty-five or ninety miles away. (T-116)

On Sunday, October 19, 1952, Dr. McGrath received a call to come to the hospital on an emergency. He did not know who called him nor did he know the appellant. (T-117) The appellant was taken to the xray room in a conscious condition although she was in shock. (T-118) Two xray films of the cervical spine and one of the thoracic cage were

taken of the appellant at the direction of Dr. McGrath. After xray films were taken the appellant was moved to a private room. She was still complaining of pains in her neck radiating to the back of her head and pains in her chest. (T-121) The doctor suspected a neck injury and attempted to put a cervical brace on the appeallant's neck. (T-123)

> "A. "It was a brace, with the pads holding the chin and also the back of the head with pads over the shoulders to hold the neck and the head absolutely rigid." (T-124)

The attempt by Dr. McGrath to put this brace on the appellant was made just as soon as he could go to the office and get the brace and go right to the hospital. (T-125) This was probably around 12:00 o'clock noon. When examined by Mr. Lazarus with reference to this brace we find the following:

> "Q. "Did you actually try to put it on, or did you show it to her?"
>
> A. "I showed it to her and explained to her what it was for, but I did not force it on her."
>
> Q. "You didn't try to put it on, am I correct?"
>
> A. "I did not force it on her."
>
> Q. "Was any attempt made to put it over her, or around her in any way?"
>
> A. "No, I wouldn't force it on her."
>
> Q. "In other words, you showed it to her and suggested to her there—"
>
> A. "I suggested it be worn." * * * *
>
> Q. "Was there much discussion about it, or did

she just say, "No", or what did she say?"

A. "She swore and said, "I won't wear that thing."

Q. "What did she do?"

A. "She swore."

Q. "You are quite sure she swore?"

A. "Yes." (T-127)

Four or five days after the xrays had been taken the report was received from the radiologist, Dr. Morris. (T-128-129) This report is not only in evidence as one of the exhibits, but is found at pages 131-132 of the transcript. Stripped of the verbiage the two cervical xray films showed, 'no evidence of fracture, luxation or subluxation". The report in connection with the thoracic film stated:

> "Faintly visualized is evidence of a symmetrical vertical dimsension in the right and left portions of the sixth thoracic body. This could easily be congenital but possibility of compression injury is not ruled out."

Examined about any further attempt to immobilize the neck, Dr. McGrath stated:

"A. "The following morning I asked to put the splint on again, the cervical splint." * * *

Q. "Did you try to put it on?"

A. "I did not try to force it on." * * *

Q. "Do you remember what the patient said?"

A. "She refused to let me apply it."

Q. "Did you insist on it?"

A. "I wasn't going to force it on her."

Q. "In other words, you showed it to her, the patient, and told her you thought she should wear it and when she protested you dropped the subject?"

A. "I couldn't force the treatment on her."

Q. "Did you tell her again the reason why you thought it was advisable for her to wear it?"

A. "I told her she needed it." (T-133) * * *

Q. "Did you give any instructions to any of the nurses with regard to using steps to immobilize the area where you thought the injuries occurred?"

A. "She had ice packs placed along each side of her neck for relief of pain and to immobilize her head."

Q. "How long were those ice packs kept there?"

A. "Not very long because she threw them off."

Q. "Did you leave instructions that they be replaced?"

A. "They were replaced."

Q. "How long were they supposed to be there at a time?"

A. "They were to be kept on constantly." (T-134)

On November 5th additional xray films were taken of the thoracic area. (T-138) At this time the neck pains were subsiding. The patient had been told when she entered the hospital not to get out of bed but she did not follow the instructions "and I instructed the nurses that I would rather see her

get up with help than for her to get up on her own accord. It would be better to do that than try to restrain her and keep her in bed." (T-141)

And again speaking of the thoracic injury, Mr. Lazarus questioned Dr. McGrath as follows:

"Q. "Doctor, after the single x-ray was taken November 5th, what further treatment for her physical needs, if any, were given following the results of that x-ray?"

A. "The patient was placed in hyperextension." (T-144)

In addition to the hyperextension care a full-length body brace was made by the Chester Brace Company in Boise and fitted to the appellant. This brace was worn for some days, and the appellant was getting up out of bed with her brace on.

"Q. "She continued to complain of pain and difficulty with her neck?"

A. "In a few days after she first got up with her brace then she began to complain of the pain in the back of her head and upper portion of her neck again." (T-148)

Thereupon Dr. McGrath ordered more xray films taken of the cervical area which films were taken on November 18th. These films were read by the defendant, Dr. Bolker, on November 20, and the report is not only in evidence as an exhibit but is found at page 153 of the transcript, and the essential part is "It is believed that the odontoid process is intact

but flexation view of the neck and lateral projection will be retaken to verify this conclusion."

The doctor stated that this report meant to him that there was a possibility the condition was congenital in origin or traumatic but that additional films were requested and taken on November 20th and the films read again by Dr. Bolker. The report was received on November 26th, and the patient thereupon told to stay in bed. (T-155)

On November 25, 1952, the day before Dr. McGrath received the final readings on the xray film from Dr. Bolker he called Dr. Burton, an orthopedic surgeon at Boise, Idaho, and on the following day Dr. Burton came to Weiser and examined the patient and suggested a full body plaster cast, which was applied by Dr. Burton on November 30th. Dr. Burton left no instructions for special care except to try and keep the patient quiet. (T-166-167)

Under cross-examination by Mr. Donart the witness stated that when he first observed the patient in the xray room at the Weiser Memorial Hospital she was in a state of shock, having severe pain and he detected, "a very strong odor of alcohol on her breath." All of these matters had to be considered and taken into consideration in the taking of the xrays and that in the process of taking the xray "it was very painful to keep her on the xray table. In fact, it would even increase the amount of shock she was in, and that she was in such serious condition that any mistreatment or slightest error would

have meant her sudden death." (T-178-179)

This witness agreed with all the other medical witnesses that "in any serious injury the patient should be considered first before the injuries. The injuries are secondary. Many times in attempting to treat the injury you may cause the patient's death". (T-181)

It was the general practice in the vicinity of Weiser for the medical profession to rely upon and accept the interpretation of xrays as given by the radiologist. (T-181)

On the 4th and 5th hospital day a change developed in the condition of the patient.

"A. "Yes, she started with delirium tremens."

Q. "And what is delirium tremens?"

A. "Well, it is a state that is characterized by horrible dreams that usually come on a chronic alcoholic that has had several years of drinking, and frequently follows a severe accident, or a serious illness. They have both visual and auditory hallucinations. In other words, they hear voices and they see animals, bugs, snakes and things of that sort."

Q. "And what manifestation did she have beginning about that time?"

A. "Well, she was hearing voices and she was seeing bugs, chickens and animals."

Q. "Any peculiar colored chickens?"

A. "Green."

Q. "How long did that condition continue?"

A. "Well, four days that it was very acute and then there was another six or seven days of some mental confusion."

Q. "During that time was she practical, could you do anything with her?"

A. "No, she got up—well, she was never restrained. People have D. T.'s should never be restrained."

Q. "Was it during that time that the episode she mentioned about going through the window occured?"

A. "The first day."

Q. "Now why don't you restrain a person who has delirium tremens?"

A. "Well, if you restrain them they may die from exhaustion or in case of injury they increase the severity of their injury." (T-193-194)

And again:

"Q. "Before you started treatment of this woman other than the liquor you smelled on her breath, or at any time when these delirium tremens developed, had you been given any suggestion or indication from her that she had been drinking alcoholic liquor rather continuously?"

A. "No, sir."

Q. "When her condition got such that she thought she could safely be xrayed again did you take a second x-ray?"

A. "I had the x-ray of the dorsal spine which had been recommended by Doctor Morris at that

time." (T-195)

The doctor then testified with relation to the thoracic vertebra that eventually showed up as being wedge shaped, that if the blood supply is shut off from the crushing then it destroys the life of the bone, and that once cut off the damage is done and that it would make no difference whether addi tional xrays were taken or not because the absorption would take place no matter what was done. (T-197-199)

The doctor testified that the body cast which Dr. Burton placed on the patient had the identical effect of immobilization as the neck brace which he wanted to put on the patient the day she entered the hospital and the body brace that he had made for her on November 5th, the only thing being that Dr. Burton's body cast was in one piece but that the effect of the treatment—the purpose of the treatment was the same. (T-220)

On page 223 of the transcript Mr. Lazarus renewed his examination of this witness and made a searching inquiry through to page 234 of the transcript of the appellant's condition particularly in connection with the delirium tremens, and only impressed the fact that the appellant had suffered from the delirium tremens over this period of some two weeks.

Following the searching examination by Mr. Lazarus of the witness in relation to the delirium tre-

mens, he was then questioned especially about his agreement with the text writers, particularly with the text of Key & Conwell. The witness gave as his opinion that the texts were very fine where and when they could be applied (T-252), but that the text was for a normal situation and that they could only be followed where a situation was normal, which was not the case of the appellant. (T-259) When the appellant entered the hospital with the pain radiating through the left side of the chest and rib fractures were suspected, Dr. McGrath taped her by use of elastic bandages. These she also removed by her own accord, and had she cooperated with the doctor he would have left them on for a long period of time. (T-266).

The doctor further testified that he attempted to get from Mrs. Cox a history of the appellant's drinking, and was advised that she had always been a problem as a drinker.

> "A. "Yes, at least that is the answer I got." (T-270)

After the delirium tremens were over, Dr. McGrath asked the appellant about her drinking and she told him that she had an occasional drink before dinner and one or two afterwards, but that he had never had a patient admit that they were excessive drinkers. (T-274)

Dr. Robert M. Coates was called by the appellant (T-284) and identified himself as a physician and

surgeon practicing his profession at Weiser, Idaho| The witness stated upon direct examination by Mr. Lazarus:

"Q. "Are you familiar with the usual standards of practice maintained in the hospital in Weiser in Washington County?"

A. "Yes, I think I can answer that." (T-286)

* * *

Q. "Doctor, is it the practice of the physicians, general practice at that hospital of the physicians to read their own x-ray films; if you know?"

A. "No, that is not the practice, sir."

Q. "What is the practice in that regard, Doctor?"

A. "It is to refer them to an x-ray specialist." (T-287)

And again:

"Q. "Now, Doctor, can you tell us whether or not under the general standards among the physicians practicing in Washington County, Idaho, whether it is considered that immobilization with respect to neck injuries of some character is necessary or desirable?"

A. "It would depend upon each case. You would have to evaluate each case, the individual, and the entire situation."

Q. "Can you tell us what the general practice would be, I know it would vary in each case, but can you tell us if there is a general practice in that regard?"

A. "In certain cases you would immobilize, and other cases you probably would not."

Q. "What type of case do you think you do not immobilize?"

A. "Would not?"

Q. "Yes."

A. "Well, of course one instance would be in which the patient refused immobilization, and another type of case would be if you felt the general condition of the patient was such that immobilization would produce further injury, you wouldn't." (T-293-294)

And again:

"Q. "Can you tell us this, Doctor, under the standards applicable in your county, can you tell us based upon the knowledge and skill of the physicians in that area, can you tell us what happens if you do have fractures of the cervical vertebrae and if for a period of time, say four weeks or five weeks, any period of time, if the fractures are not reduced or immobilized or treated; can you tell us whether ordinarily any damage results?"

A. "Not necessarily, no."

Q. "Now, Doctor, can you tell us as a result of your knowledge and skill, can you tell us what the ordinary accepted treatment in your county where a diagnosis is made of a compression fracture in the thoracic area, can you tell us how the patient is ordinarily treated?"

A. "Ordinarily you would put them in hyperextension." (T-295)

On cross-examination by Mr. Donart the witness testified with reference to the practice in his vicinity in regard to xray film:

> "Q. "And having obtained the opinion of the radiologist, to support any views you might have, or that is the general practice for the general practitioner to subordinate his views as to what is shown by that x-ray to the views of the radiologist as shown by his report?"
>
> A. "I accept the radiologist's opinion, yes."
>
> Q. "And that is the general practice, is it not?"
>
> A. "Yes, sir." (T-300)

The witness again stated (T-301) that obtaining additional xrays depended entirely upon the individual case. This witness further stressed under cross-examination that cooperation of the patient with his physician is essential and stated:

> "Q. "So if a patient is uncooperative he can throw them (sand bags) off?"
>
> A. "That is right."
>
> Q. "The effective use of sand bags, like the effective use of ice packs, we will say, requires cooperation by the patient, doesn't it?"
>
> A. "That is right."
>
> Q. "Now I believe you stated in a case of neck injury immobilization is advisable?"
>
> A. "In certain instances, yes, sir." (T-302)

And again:

> "Q. "Let's take a case of a patient with a serious neck injury, the patient three times refuses

to allow her neck to be placed in a neck brace and where ice packs are put on she throws them off, and the patient then is uncooperative; isn't it a fact that it is just as likely to be harmful to that patient to try and force her into immobilization as it is to leave her alone?"

A. "That is right, sir." (T-303)

And the following:

"Q. "Now when you have a patient like this one, a patient we will say that is uncooperative, she is suffering severe pain; isn't it better just to leave her neck alone upon the assumption that that being painful she will immobilize herself; isn't that more in harmony with the general practice than to try to force immobilization on her?"

MR. LAZARUS: I am going to object to the portion of the question "a patient like this one."

BY MR. DONART:

"Q. "Her condition and anatomy in very severe pain and uncooperative?"

MR. LAZARUS: "It is the defendant's contention in this case she was uncooperative, and the plaintiff's contention she was cooperative."

THE COURT: "There is evidence here she was uncooperative."

MR. LAZARUS: "And evidence she was."

THE COURT: "You can examine on it."

(Last questions read by the reporter).

A. "Yes, that is right."

Q. "Isn't it consistent with a general practitioner of medicine that if a person has got a severe

injury of the neck, where it is painful to move that neck, the patient himself is not likely to move it?"

A. "Yes, sir, that is correct." (T-304-305)

In discussing the matter of placing a patient with a compressed thoracic vertebrae in hyperextension the cross-examination continued:

"Q. "Hyperextension can do good?"

A. "Yes, sir." (T-306)

And again:

"Q. "When a patient like this is brought into a hospital with injuries, which is the first thing you treat, the injury or the patient?"

A. "You treat the patient."

Q. "In other words, if there is something about the patient's condition aside from this injury that requires treatment, that is treated first, isn't that it, or first consideration?"

A. "Yes, that is right."

Q. "In other words, you go on the theory it is better to have a live patient with something of an injury than a dead patient?"

A. "That is correct." * * *

Q. "Doctor, in your experience would the fact that a patient was brought into the hospital in a state of shock, suffering from a severe injury, and was in severe pain for three or four days, and beginning the fourth day developed a case of delirium tremens, would that make a difference in

the treatment that would be accorded to the patient?"

(Objections and rulings)

A. "The answer is yes."

Q. "It isn't the general practice to attempt to put a patient suffering from delirium tremens either in hyperextension or in forced immobilization, is it?"

A. "No, it is not." (T-309-311)

After some re-direct examination cross-examination by Mr. Donart:

"Q. "Now, Doctor, if a person came in with serious injuries, before you started any particular treatment of those injuries you would ascertain whether the patient was in physical condition to withstand the treatment, wouldn't you?"

A. "Yes, sir."

Q. "There would be no percentage in correcting an injury if a patient couldn't stand the treatment, would there?"

A. "That is correct." * * *

Q. "It wouldn't have been the practice to attempt to put the patient on an x-ray table and take an x-ray if the patient was suffering from delirium tremens?"

A. "No, that is correct." (T-314)

Q. "There must be a pretty compelling reason for further x-rays before one is taken of the patient in that condition; isn't there?"

A. "In what condition?"

Q. "The condition this woman was in with the pain she was suffering?"

MR. LAZARUS: "—I take it—

THE COURT: "Yes, it is assuming facts that he hasn't stated."

MR. DONART: "I will add the necessary trimmings."

BY MR. DONART:

Q. "—At the time of the admission and afterwards with injury to her neck and injury to her sixth dorsal vertebrae, and having gone through a spell of delirium tremens; a patient in that condition would suffer considerable agony just being placed on an x-ray table for the taking of x-ray pictures; wouldn't she?"

MR. LAZARUS: "If you know, of course, Doctor?"

A. "By being placed on an x-ray table?"

Q. "Yes, and an x-ray taken?"

A. "Yes, that is correct." (T-314-315)

The defendant, Dr. Judson B. Morris, was next called by the appellant under Rule 43(B) (T-316) and questioned with reference to the taking and reading by him of xray films. On cross-examination by his own counsel (T-342) we find this testimony of Dr. Morris in speaking about the two xray films taken on October 19, 1952, of the cervical spine of the appellant:

Q. "I believe you said the reason that the film did not show the fracture was that it is in perfect

alignment; is that your testimony?"

A. "Yes."

Q. "Now I am asking you, would it have been proper to have turned or twisted that neck to try to get any other films with that condition existing?"

(Objections and rulings omitted.)

A. "If I suspected a serious neck injury or knew that there was likely to be one, we instruct our technicians definitely—

(Objections and rulings omitted)

A. "It would not be proper to turn the head for examining."

Q. "Explain what you think should have been done?"

A. "The head should not have been turned."***

Q. "Tell the jury when a patient, a patient comes in for that to you suffering from shock, whether it is good medical practice to take whole series of skull and cervical spine pictures, or whether it is good practice to leave them alone with as few as possible?"

(Objections and rulings omitted.)

A. "With as few as possible is the answer, that is the best practice."

Q. "Doctor, is it the practice to often take none at all?"

A. "Very frequently."

Q. "Where does the danger lie, in the fracture or in the cord, or tissue?"

A. "The most important thing is the soft tis-

sues such as the spinal cord in case of the spine, or brain in case of injuries around the skull." (T-344)

And again:

"Q. "Is a patient in shock a good subject or a good risk on the x-ray table?"

A. "No, sir, they are not. We never take x-rays of a patient in shock."

Q. "You never do?"

A. "No, sir."

Q. "In addition to that, if the patient had a strong odor of liquor on her breath would that add to any reason why more pictures should not be taken?"

(Objections and rulings omitted)

A. "If it is such as to be strong enough to make you suspect they were under the influence so they couldn't cooperate it would make a definite difference."

Q. "Doctor, now if the patient was not cooperative, does that make a difference in the number of pictures you take?"

A. "Certainly does." (T-347)

And again:

Q. "Wouldn't the factors now, Doctor, of shock and then at least getting to the point where there was a strong odor, and with the patient complaining of severe pain in the neck, would you take any pictures at all or in excess of two?"

A. "No, we wouldn't." (T-348)

And again:

Q. "Would it be proper practice of medicine to take or attempt to take x-ray films of either the cervical or dorsal spine on a patient suffering with delirium tremens?"

A. "Did you say would it be possible?"

Q. "Would it be good practice of medicine?"

A. "I would say not." (T-352)

Colette Marie Casslo, whose deposition was taken at San Francisco by the appellant on March 2, 1955, identified the hospital record as made at the Notre Dame Hospital and the xray pictures taken by the hospital of the appellant. There is no further comment needed on her testimony.

Dr. John Joyce Loutzenheiser was the next witness called by the appellant and testified by deposition taken at San Francisco on March 2, 1955. On direct examination the witness stated that he is an orthopedic surgeon practicing in the Bay area. He first saw the appellant at the Notre Dame Hospital in San Francisco on December 9, 1952. (T-361) She was encased in plaster from the back of her head and chin to the pelvic brim. (T-362)

The physical examination made by the witness and the xray films taken at the hospital showed a fracture through the odontoid process of the second cervical vertebrae and a severe compression of the sixth thoracic vertebrae. (T-364)

In the treatment of the appellant, Dr. Loutzen-

heiser removed the cast and then attempted to straighten the spine first by means of traction—traction upon the head. This was done by means of canvas and leather supports to the back of the head and chin rather than pins through the skull. Also attempt to gradually extend the thoracic spine in order to overcome the compression was not successful. (T-371)

In describing the traction on the head we find:

"A. "Yes, the head of the bed is raised to allow the body to act as a counter traction while you apply a given amount of weight over a pulley attached to the apparatus that I have previously described for a pull upon the skull so that a traction there is transmitted to the cervical spine in an effort to straighten it out and also to protect it." (T-372)

In further describing the treatment and the appellant, the witness stated:

"A. Well, she didn't tolerate any of this very well. This patient had had so much pain from the compression of the nerve roots at the level of the compressed sixth thoracic vertebra, the pain primarily coming around underneath the left scapula and extending out along the rib cage that we had to adjust all treatment to patient's comfort. This patient had not eaten well, was markedly under weight, badly undernourished. I would say at the end of this seven weeks of pain she was in poor physical condition. So we treated her as

a patient." * * * (T 373).

On further direct examination by Mr. Lazarus we find:

"Q. "Doctor, where you have a suspected fracture of the neck is early immobilization of that area important?"

A. "Well, that depends on the supervising surgeon's opinion. He may prefer to use—again to care for his patient. I don't know the situations that existed at the time of the injury and I couldn't comment on that. I have many times had to compromise with what was accepted procedure in order to save the life of my patient."

Q. "In other words if there were other conditions which require paramount consideration they should get it; is that correct?"

A. "That is correct."

Q. "Doctor, is early treatment important, however, in fractures of this type as far as their future is concerned?"

A. "Well, early treatment is always important treatment of the whole person. It is the treatment of the whole person, not any given spot that might be hurt." * * * (T-378-379)

On cross-examination by Mr. Roos (representing the defendant, Dr. Norman Bolker), the witness testified:

"Q. "I think you said in the course of your direct examination that there was little difficulty in diagnosing a fracture of T6 by x-ray?"

A. "That wasn't exactly what I stated, if you would like me to answer your question."

Q. "O. K.: was that your testimony?"

A. "Well; something preceded that statement. A compression fracture of this type would have very little difficulty as we saw it, there would be very little difficulty. You could have a fracture of T6 or any other vertebra that you would have difficulty possibly in diagnosing immediately, because it would maintain possibly its contour before collapse and then collapse. There was no evidence of any pathological circumstance in this patient which would allow—collapse of the vertebra other than injury, however."

Q. "Well, would you assume, Doctor, that the first x-rays taken shortly after the accident of the thoracic spine in Idaho—in connection with those x-rays would you assume that the radiologist reported that he was uncertain but that the possibility of a compression fracture of T6 should not or could not be ruled out. What action in your opinion would be called for by the attending surgeon after receiving such a radiologist's report?"

A."Oh, I couldn't answer that particularly. I mean, here you have a badly injured patient. That was obvious. She was in a great deal of pain. Lying on an x-ray table itself is a torture, and in my own personal opinion, I might not subject my patient to an immediate survey on the basis of such a report; I would take care of my patient first and the x-rays in their proper time."

Q. "I suppose also that it would be entirely possible that angulation of the fracture or something had changed in between the time immediately after the accident and the seven weeks which it took her to arrive at Notre Dame; isn't that true?"

A. "The angulation of a fracture can change constantly during the time of care if you haven't the opportunity of completely protecting this patient because of other injuries, or other conditions, I mean. A patient may have a fractured vertebra which you have restored to perfect height collapse on you just lying in bed again, from the forces within the body during movement. Of course then, to give the conclusion to your answer then, the damage is done at the time of the injury but the degree of compression will be resultant of all the forces that occur as a result of this damage. They may not occur right at the start." (T-381-383)

On re-direct examination of the doctor by Mr. Lazarus the doctor was asked the following:

"Q. "Just one thing more, Doctor. What are the usual symptoms of serious neck injury or cervical fractures? What are the common symptoms?"

A. "Well, pain of course."

Q. "In the area involved, of course?"

A. "Not always. I mean unrecognized fractures of the spine are commonplace. A person

gets hurt in one place and the pain in that area might be influenced by the pain in another area and might go unrecognized in the location of the injury." (T-384)

Mrs. Sidney Cox was next called by the appellant (T-385) and identified herself as the twin sister of the appellant. At the time of the accident she was living in Bend, Oregon, and during the course of the stay of the appellant in the Weiser Memorial Hospital, this witness made three visits to her sister at Weiser. The first was on Thursday, October 23, 1952. She stayed only that one day. (T-388) The second was two days later (T-393) and the third was at Thanksgiving time. Throughout the testimony of the witness she described the pain which she observed the appellant suffering and her attempts to comfort the appellant. On direct examination the witness related that almost immediately after her return to Bend, Oregon, from her first visit, she was recalled to Weiser because of a change in the condition of her sister. In discussing this condition she testified:

"Q. "Did you notice any change in your sister's condition at that time?"

A. "Yes, sir."

Q. "What was it?"

A. "Well, to begin with, when we arrived and entered the bedroom my sister was, of course, so joyous and said, 'Sidney, you have some and come to help me,' and I knew from the expression in her

eyes she was speaking incoherently, and she said she was so glad I brought "Bonnie Hill". Of course, at that time my grandbaby that we had lost several months previously was who she was talking about, and by that comment I knew something was very strange."

Q. "She was talking then about one of your deceased children? That is deceased grandchild?"

A. "Yes, sir."

Q. "That she thought was with you at the time?"

A. "Yes, sir, that is right." * * * (T-394)

And again:

Q. "Any difference in her appearance?"

A. "Oh, her whole appearance was different. The expression of her eyes, her way of conversation, wasn't reasonable talk to me."

Q. "In addition to the talk being unreasonable, did you notice any difference except the expression on her face?"

A. "And the tape on her hand."

Q. "Anything different about her eyes?"

A. "The pupils were greatly dilated, and her eyes were more or less shiny or glassy."

Q. "Did she at that time tell you of any incident that had happened while you were gone?"

A. "Yes, sir. My sister said she had broken a window and stepped into it."

Q. "You don't recall any other symptoms that your sister had at that time?"

A. "Yes, sir. She kept staring at the floor, and

assuming there was something down there, and then seemed to have a fear something was trying to hurt her on the outside of the window, and she would keep looking and she said, "Sidney, what is that out there, they have to hurt me." (T-394-395.)

The witness related that the following morning she talked to the appellee, Dr. McGrath, and explained her worry over her sister's condition and the possibility of her neck being broken. The doctor advised her that the xray films didn't reveal a fracture; but in connection with his concern of the sister, he asked Mrs. Cox, "Has your sister ever been a heavy drinker?" to which the witness replied, "No, Dr. McGrath." (T-396)

Under further examination by appellant's counsel in connection with the drinking by the appellant the witness stated, "Yes, my sister will take a drink but never over-drinking." (T-406)

The last witness called by the appellant was Gardner F. Wood, the twenty-four year old son of the appellant, and his testimony was merely cumulative to that already in the record and no further comment will be made on it.

At the conclusion of this testimony the defendants, and each of them, separately and individually, moved the Court to dismiss the action upon the ground and for the reason that upon the facts and the law the appellant had shown no right to relief

and then specified the grounds and reasons in detail. (T-450-453)

As to the defendant Dr. Morris, Mr. Lazarus stated, "We do not resist the motion". (T-453). The motion was thereafter granted as to the defendant Dr. McGrath, from which order of dismissal the appellant had sought this review.

ARGUMENT

A. THE STANDARDS OF PRACTICE BY WHICH THE MEDICAL PROFESSION IS JUDGED IS UNIVERSALLY KNOWN AND RECOGNIZED. THEY ARE:

(1) Individuals licensed to practice medicine are presumed to possess that degree of skill and learning which is possessed by the average member of the profession in the community in which he practices, and that he has applied that skill and learning with ordinary and reasonable care to those who come to him for treatment;

(2) The contract which the law implies from the employment of a physician or surgeon, is that the doctor will treat his patient with that diligence and skill above mentioned;

(3) He does not incur liability for his mistakes if he has used methods recognized and approved by those reasonably skilled in the profession;

(4) Before a physician or surgeon can be held liable for malpractice, he must have done something in the treatment of his patient which the recognized standard of the medical practice prohibits in such cases, or, he must have neglected to do something required by those standards;

(5) In order to sustain a judgment against a physician or surgeon, the standard of the medical practice in the community must be shown, and, further, that the doctor failed to follow the methods prescribed by that standard;

(6) It is not required that physicians and surgeons guarantee results, nor that the results be what is desired;

(7) The testimony of other physicians that they would have followed a different course of treatment than that followed by appellee, or a disagreement of doctors of equal skill and learning as to what the treatment should have been does not estalish negligence. In such cases the courts must hold that there is nothing upon which the jury may pass, the reason being, the jury may not be allowed to accept one theory to the exclusion of the other; and

(8) Negligence on the part of a physician or surgeon by reason of his departure from

the popular standard of practice, must be established by medical testimony. The evidence, from the very nature of the case, must come from men learned in the profession, because other witnesses are not competent to give it.

Fritz v. Horsfall
163 Pac. (2) (Wash) 148
Willis v. Western Hosp. Assn.
182 Pac. (2) 950 (Ida)
Swanson v. Wasson
292 Pac. 197 (Ida)
Evans v. Bannock County
83 Pac. (2) 427 (Ida)

B. NEGLIGENCE, LACK OF SKILL, NEGLIGENCE IN APPLYING SKILL, OR ANY OTHER ACT ON THE PART OF A PHYSICIAN AND SURGEON FALLING WITHIN THE BROAD TERM OF MALPRACTICE, CAN ONLY BE PROVEN BY MEDICAL EXPERTS.

Willis v. Western Hosp. Assn.
67 Ida. 435; 182 Pac. (2) 950
Trindle v. Wheeler
143 Pac. (2) (Cal.) 932
Church v. Block
182 Pac. (2) (Cal.) 241
Engelking v. Carlson
88 Pac. (2) (Cal.) 695
Seneris v. Haas

281 Pac. (2) (Cal.) 278

Ayers v. Perry

192 Fed. (2) 3rd Cir. Ct. of Appeals, 181

Mitchell v. Saunders

13 S. E. (2) 242

141 A. L. R. 6

Lashley v. Korerber

150 Pac. 272 (Cal.)

7 *Wigmore on Evidence*

3rd Ed. 453, para. 2090.

> "The overwhelming weight of authority supports the view that ordinarily at least, expert testimony is essential to support an action for malpractice against a physicial or surgeon."
>
> 141 A. L. R. 6

In the case of *Ayers v. Parry*, 192 Federal (2d) 181 at 184 we find:

> "The lack of due care, or lack of diligence on the part of a physician in diagnosis, method and manner of treatment ordinarily must be established by expert testimony. . . ."

Continuing further on the same page:

> "Occasionally expert testimony is not required where an injury results to a part of the anatomy not being treated or operated upon and is of such character as to warrant the inference of want of care from the testimony of laymen or in the light of the knowledge and experience of the jurors themselves. This situation arises

when an ulterior act or omission occurs, the explanation of which does not require scientific opinion."

In the case of *Engleking v. Carlson*, 88 Pacific (2d) 695 at 697 we find:

> "Whether he has done so in a particular case is a question for experts and can be established only by their testimony. *Perkins v. Trueblood*, 180 Cal. 437, 181 P. 642; *Patterson v. Marcus*, 203 Cal. 550, 265 P. 222. And when the matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen, the expert evidence is conclusive. *William Simpson C. Co. v. Ind. Acc. Com.*, 74 Cal. App. 239, 240 P. 58; *Johnson v. Clarke*, 98 Cal. App. 358, 276 P. 1052. Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it will be presumed that a physician or surgeon exercised the ordinary care and skill required of him in treating his patient. *Donahoo v. Lovas*, 105 Cal. App. 705, 288 P. 698."

In the case of *Trindle v. Wheeler*, 143 Pacific (2d) 932 at 933:

> "The law requires that the physician shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that

learning and skill to the treatment of his patient. Whether he has done so in a particular case is generally a question for experts and can be established only by their testimony unless the matter in issue is within the common knowledge of laymen."

"When the matter in issue is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert testimony is conclusive."

Lashley v. Korerber
150 Pac. (Cal.) 272.

"It happens, however, that in one class of cases, viz: actions against a physician or surgeon for malpractive, the main issue of the defendants use of suitable professional skill may be a topic calling for expert testimony only; and also that the plaintiff in such an action often prefers to rest his case upon the mere fact of his sufferings, and to rely upon the jury's untutored sympathies, without attempting specifically to evidence the defendants' unskillfulness as the cause of these sufferings.* * That expert testimony must appear somewhere in the plaintiffs' whole evidence; and for lack of it, the court may rule, in its general power to pass upon the sufficiency of the evidence that there is not sufficient evidence to go to the jury."

7 Wigmore on Evidence
3d Ed. 453, para. 2090.

The Supreme Court of Idaho in *Swanson v. Wasson*, 292 Pac. 147, said:

"Where the evidence is as consistent with the absence, as with the existence, of negligence, the case should not be left with the jury. As was said in *Ewing v. Goode*, 78 Fed. 442, 443:

'If there is no injury caused by lack of skill or care, then there is no breach of the physician's obligation, and there can be no recovery. *Craig v. Chambers*, 17 Ohio St. 253, 260. Mere lack of skill or negligence, not causing injury, gives no right of action, and no right to recover even nominal damages . . . . .

Before the plaintiff can recover, she must show by affirmative evidence—first, that defendant was unskillful or negligent; and, second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury."

In the recent malpractice case of *Willis v. Western Hospital Assn.*, 182 Pac (2) 950, the Supreme Court of Idaho, not only quoted with approval the case of *Swanson v. Wasson*, supra, but added:

"The burden of proof was on appellants and it is not sufficient to merely show a possibility or raise a suspicion that respondents may have been negligent."

In the case of *Ayers v. Perry*, 192 Fed. (2) 181 (3d CCA) at page 185, the court in discussing an action against a doctor said:

> "We think it is beyond dispute that the nerve roots which were damaged in the process of producing anesthesia by injecting the drug into the spinal cord are within the region of treatment and that the cause of this injury to the nerve roots and its effects on the legs and adjacent organs, must be explained by experts. When the expert testimony offered by the plaintiff ascribes the cause to the toxic quality of the injected drug as distinguished from negligence of the anesthetist that evidence is binding upon the court and the jury would not be permitted to speculate to the contrary."

What now of the medical testimony offered by the appellant which she claims is sufficient to take this case to the jury? There are certain basic facts in this case some of which are admitted by the appellant and some of which, while not admitted, are not denied:

1. The appellant received a number of very serious injuries in an automobile accident on October 19, 1952, near Weiser, Idaho;

2. She was taken to the Weiser Memorial Hospital suffering excruciating pain, she was in shock;

3. There was a strong odor of liquor upon her breath;

4. Her general physical condition would not tolerate more than the utter minimum of handling;

5. The utter minimum of xray films was indicated due to her physical condition;

6. On the fourth or fifth hospital day, the appellant developed delirium tremens, referred to by appellant as delirium-shock-hallucinations.

7. Appellant's physical and mental condition did not permit a return to x-ray before November 5th.

The appellant called Dr. Robert M. Coates, a physician and surgeon in general practice at Weiser, Idaho since 1930, except the time he spent in the military service. This witness was questioned at length by the appellant and we make this flat assertion, Dr. Coates not only found nothing wrong with appellee's conduct as a physician and surgeon in the care and treatment of the appellant, but placed his stamp of approval upon it.

All of the physicians practicing in Weiser referred the X-ray films to a radiologist and relied upon the radiologist's report. (T-287). This, as we will later point out, is exactly what Dr. McGrath did. Further, Dr. Coates stated that each case must be treated separately. A doctor must evaluate the entire situation of a patient and treat it as such and that no rule of the thumb, so to speak, could be laid down in the care of fractures. (T-292-293).

When a diagnosis is made of a compression fracture in the thoracic area ordinarily the proper treat-

ment would be to place the patient in hyperextension. (T-295). Again we say, this is exactly what Dr. McGrath did.

If a patient is uncooperative, any forced treatment is apt to be more harmful to the patient than if the patient was left alone. (T-303). This again is exactly the situation that Dr. McGrath faced.

Questioned about the treatment of the injuries of the patient—that is, which has preference, the treatment of the injuries or the care of the patient, Dr. Coates reiterated time and again, the patient must be considered first. (T-310). Dr. Coates further testified on behalf of the appellant, that under no circumstances should the patient be placed on an X-ray table when suffering with delirium tremens. (T-314).

While we have not attempted to cover the entire testimony of Dr. Coates, we have referred, we believe, to sufficient of it to demonstrate that at no time did Dr. Coates even intimate that Dr. McGrath did not follow the accepted practice in the vicinity. In this connection, we call this Honorable Court's attention to the fact that the appellant has in her brief, we feel, studiously avoided any reference or citation to the medical testimony introduced by her.

The appellant called Dr. Judson B. Morris, first under Rule 43 (B) (T-316) and then followed by making the doctor her own witness. (T-328-332). Dr. Morris, it is of course also recalled, was a de-

fendant in this case. As a radiologist he examined the first two films taken of the cervical spine of the appellant and his report on those was that there was "no evidence of fracture, luxation or subluxation". (T-131-132). Dr. Morris stated that where there was a serious neck injury suspected, the fewer X-ray films taken, the better, and that it is very frequently the practice to take none at all. (T-344-345).

He further stated that where a patient is in shock, he never takes X-rays, (T-349) and that it would not have been good practice of medicine to have attempted to take X-ray pictures of a patient suffering from delirium tremens. Again, we suggest to this Honorable Court, that Dr. Morris finds no criticism whatsoever of the treatment afforded by Dr. McGrath. Certainly the most that can be said is that initially Dr. McGrath had two films of the cervical spine taken, whereas Dr. Morris questions if he would have taken any under the circumstances; however, the appellant's complaints against Dr. McGrath are not that the doctor took these two X-ray films, but rather that he did not take enough or often enough. Certainly the appellant can get neither comfort from nor cite any testimony of Dr. Morris to bear out this contention.

It will be recalled the appellant left the Weiser Memorial Hospital and arrived in Notre Dame Hospital in San Francisco on the morning of December 9th, and was placed under the service of Dr. John Joyce Loutzenheiser, an eminent orthopedic surgeon

in San Francisco. Dr. Loutzenheiser was called to testify in this case and did so by way of deposition taken in San Francisco on March 2, 1955.

Let us look at the record to see if this eminent surgeon had any criticism of the treatment offered and afforded by this country doctor of Weiser to the appellant. After a physical examination and X-ray film by Dr. Loutzenheiser, he placed the appellant's cervical spine in traction. (T-371). This is identically what Dr. McGrath wanted to do with appellant on the first and second days she was in the Weiser Memorial Hospital, but, did the appellant accept the treatment suggested by Dr. McGrath? The answer is found both by the appellant (T-47, "He didn't get it on me, let's put it that way" (T-87) and the testimony of Dr. McGrath, "She swore and said "I won't wear that thing'. " (T-127) The next treatment by Dr. Loutzenheiser was a back body cast, identically what Dr. McGrath did when he had the back body cast made by the Chester Brace Company of Boise, Idaho. Certainly then, as to those matters, this country doctor was trying to use the same treatment as was afforded by this eminent surgeon, Dr. Loutzenheiser.

We beg to quote again from the deposition of Dr. Loutzenheiser:

"By Mr. Lazarus:

Q. Doctor, where you have a suspected fracture of the neck, is early immobilization of the area important?

A. Well, that depends on the supervising surgeon's opinion. He may prefer to use—again to care for his patient. I don't know the situation that existed at the time of the injury and I couldn't comment on that. I have many times had to compromise with what was accepted procedure in order to save the life of my patient.

Q. In other words if there were other conditions which required paramount consideration they should get it; is that correct?

A. That is correct.

Q. Doctor, is early treatment important, however, in fractures of this type as far as their future is concerned?

A. Well, early treatment is always important —treatment of the whole person. It is the treatment of the whole person, not any given spot that might be hurt. Nobody can be-little the necessity for the highest type of care in severe injury. So earlier treatment of course is important." (T-378-379)

Again, we make the observation, wherein does Dr. Loutzenheiser condemn this country doctor? Dr. Loutzenheiser states: "I don't know the situation that existed at the time of the injury and I couldn't comment on that". "Well, that depends on the supervising surgeon". In other words, Dr. Loutzenheiser said in effect, "I was not there and it is for the supervising surgeon to exercise his judgment". (meaning Dr. McGrath). He specifically

gives approval at a later place in his testimony. (T-381-382).

What was the situation that faced Dr. McGrath? He had a patient who for a week had been out on a vacation and celebration in the little town of Council, Idaho, drinking an unverified amount of whiskey.

> "When you are supposed to be enjoying yourself, you don't count them". (T-93)

At any rate, when the appellant was placed upon the xray table in the Weiser Memorial Hospital, sometime around ten thirty or eleven o'clock on Sunday, October 19th, she was obviously suffering severe injuries. She was in shock and there was a strong odor of alcohol liquor on her breath, and four or five days thereafter she developed delirium tremens, which lasted severely for four days and then continued to a less degree for six or seven days. Dr. Loutzenheiser knew exactly what he was talking about when he said "I have many times had to compromise with what was accepted procedure in order to save the life of my patient". (T-378-379) No wonder he told the court that the attending surgeon was the one who had to exercise the judgment. But, did the appellant's physician stop with the above observation? When asked on cross-examination with reference to the taking of additional xray films he not only confirmed the care as afforded by Dr. McGrath, but confirmed Dr. Morris, another of appellant's physician witnesses.

This is his testimony.

"Q. I think you said in the course of your direct examination that there was little difficulty in diagnosing a fracture of T6 by x-ray?"

"A. That wasn't exactly what I stated, if you would like me to answer your question."

"Q. O.K.; was that your testimony?"

"A. Well; something preceded that statement. A compression fracture of this type would have very little difficulty as we saw it, there would be very little difficulty. You could have a fracture of T6 or any other vertebra that you would have difficulty possibly in diagnosing immediately, because it would maintain possibly its contour before collapse and then collapse. There was no evidence of any pathological circumstance in this patient which would allow—collapse of the vertebra other than injury, however."

"Q. Well, would you assume, Doctor, that the first x-rays taken shortly after the accident of the thoracic spine in Idaho—in connection with those x-rays would you assume that the radiologist reported that he was uncertain but that the possibility of a compression fracture of T6 should not or could not be ruled out. What action in your opinion would be called for by the attending surgeon after receiving such a radiologist's report?"

"A. Oh, I couldn't answer that particularly. I mean, here you have a badly injured patient. That was obvious. She was in a great deal of pain. Lying on an x-ray table itself is a torture, and in

my own personal opinion, I might not subject my patient to an immediate survey on the basis of such a report; I would take care of my patient first and the x-rays in their proper time." (T-381-382).

Note, if the court please, the statement of Dr. Loutzenheiser in regard to placing this patient back on the x-ray table. "Lying on an x-ray table itself is a torture, and in my own personal opinion, I might not subject my patient to an immediate survey on the basis of such a report; *I would take care of my patient first and the x-rays in their proper time.*" (emphasis ours)

Where, we ask the appellant, does Dr. Loutzenheiser, either condemn or disapprove of the treatment afforded by Dr. McGrath?

The appellant called the appellee, Dr. M. S. McGrath, as a witness at the trial of this cause under Rule 43 (B). In our statement of the case, we have brought to the court's attention at least some of the salient parts of his testimony. His testimony covers from pages 111 to 283 of the record, and for two days he under went a most searching examination. Page 14 of the appellant's brief is devoted to the testimony of Dr. McGrath and an obvious attempt is made to pick out isolated statements to justify the position of the appellant that there was evidence sufficient to carry her case to the jury. What counsel did not say or point out, is far more significant than the few little sketchy observations that are

pointed out. Counsel states "that he did nothing to immobilize her injured neck after suggesting that she wear a neck brace". (R-134), but what counsel did not say was that three times Dr. McGrath tried to persuade appellant to let him put a neck brace on her and that she swore at him and said "I won't wear that thing." What counsel did not point out was that he had ice-packs placed on each side of the neck and tried to have them kept there, but the appellant would not tolerate that and would throw them out on the floor. What counsel did not point out was that as soon as the appellant had recovered sufficiently from the delirium tremens to be placed upon the x-ray table, this was done and as soon as the radiologist's report revealed a compression fracture of T6, the patient was placed in hyperextension and a body brace made for her. This is exactly in harmony with what Dr. Coates said was proper in the vicinity and exactly what Dr. Loutzenheiser did in San Francisco. What counsel did not point out was that as soon as the fracture of the odontoid process was demonstrated by the x-ray, Dr. McGrath called an orthopedic surgeon Dr. Burton from Boise and that some four or five days after Dr. Burton examined the patient, he, Dr. Burton, placed her in the plaster cast, immobilizing the head and neck.

What counsel did not point out was that Dr. McGrath had not only a seriously injured patient, but an uncooperative one. What counsel did not point out was that every medical expert which he called

and questioned, testified that a doctor first treats the patient, and the injuries in their due time. What counsel did not point out was, to take the answer from Dr. Loutzenheiser, that the damage to the thoracic vertebra is done at the time of the injury and that it can collapse while the patient is just lying in bed. What counsel did not point out, to refer back to Dr. Coates, is that in the treatment of an injured person, "it is better to have a live patient with something of an injury, than a dead patient."

Those, Your Honors, are only a few of the things that counsel for appellant did not point out, but to return to the things he did point out, there is not one word of medical testimony in this entire record that Dr. McGrath did either some act which good medical practice required he should not have done, or that he failed to do some act that good medical practice required that he should do.

Going one step further, complaint is made by appellant of some stiffness of her neck, but she has a union of the odonoid process with a perfect alignment. She has some stiffness, but it is strange and singular that there is not one word of testimony from anyone, medical expert or otherwise, who claim or assert that the stiffness is not the natural result of the injuries.

C. THE LAW HAS NEVER HELD A PHYSICIAN OR SURGEON LIABLE FOR EVERY UNTOWARD RESULT WHICH MAY OCCUR IN MEDICAL PRACTICE,

BUT DEMANDS ONLY THAT A PHYSICIAN OR SURGEON HAVE THE DEGREE OF LEARNING AND SKILL ORDINARILY POSSESSED BY PRACTITIONERS OF THE MEDICAL PROFESSION IN THE SAME LOCALILTY, AND THAT HE EXERCISE CARE IN APPLYING SUCH LEARNING AND SKILL TO THE TREATMENT OF HIS PATIENTS.

McAlinden v. St. Maries Hosp. Assn.
156 Pac. 115 (Ida)

Willis v. Western Hosp. Assn.
182 Pac. (2) 950 (Ida)

Seneris v. Haas
281 Pac. (2) (Cal) 278

Huffman v. Lindquist
234 Pac. (2) (Cal.) 34
29 A. L. R. (3d) 485

Engelking v. Carlson
88 Pac. (2) (Cal.) 695

Fritz v. Horsfall
163 Pac. (2) (Wash) 148

Trindle v. Wheeler
143 Pac. (2) (Cal.) 932

Church v. Block
182 Pac. (2) (Cal.) 241

Ayers v. Perry
192 Fed. (2) 3d CCA 181

Mitchell v. Saunders
13 S. E. (2) 242

141 A. L. R. 6
Lashley v. Korerber
150 Pac. 272 (Cal.)
7 *Wigmore on Evidence*
3d Ed. 453, para. 2090
Swanson v. Wasson
292 Pac. 197 (Ida)
Evans v. Bannock County
83 Pac. (2) 427 (Ida)
Norden v. Hartman
285 Pac. (2) 977

In the California case of *Engelking v. Carlson*, 88 Pac. (2) 695, the court among other things, said:

> "The law has never held the physician or surgeon liable for every untoward result which may occur in medical practice. It requires only that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that learning and skill to the treatment of his patient. * * * Whether he has done so in a particular case is a question for experts and can be established only by their testimony. * * * And when the matter at issue is one within the knowledge of experts only and is not within the knowledge of laymen, the expert evidence is conclusive. * * * Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved."

and ending its opinion the Court said:

"Medical evidence is required to show not only what occurred but how and why it occurred. That evidence established beyond question not only that the paroneal nerve may be injured even where due care is used but that this unfortunate result invariably occurs in a limited number of cases. The doctrine of res ipsa loquitur is, therefore, entirely inapplicable."

D. THE DOCTRINE OF RES IPSA LOQUITUR IS ONLY APPLIED IN MALPRACTICE CASES IN THOSE RARE INSTANCES IN WHICH A LAYMAN IS ABLE TO SAY AS A MATTER OF COMMON KNOWLEDGE AND OBSERVATION, THAT THE CONSEQUENCE OF PROFESSIONAL TREATMENT WERE NOT SUCH AS ORDINARILY WOULD HAVE FOLLOWED IF DUE CARE HAD BEEN EXERCISED.

Typical examples wherein the doctrine has application, are those wherein a sponge is left in the body; wherein the patient was burned with hot compresses; wherein the patient was burned through the operation of xray machines; wherein a hypodermic needle was lost in the body; wherein no xray at all was taken in the treatment of fractures; wherein the injury complained of bears no relation and could not be a consequence of necessary medical or surgical treatment, an instance where a patient is operated on for some abdominal disorder and re-

covers from the anesthetic with a fracture of some part of the anatomy not connected with the field of operation:

Reinhold v. Spencer
26 Pac. (2) 796 (Ida)

Engelking v. Carlson
88 Pac. (2) (Cal.) 695

Seneris v. Haas
281 Pac. (2) (Cal.) 278
141 A. L. R. 12

Moore v. Steen
283 Pac. (Cal.) 833

Batham v. Widing
291 Pac. (Cal.) 173

Ales v. Ryan
64 Pac. (2) (Cal.) 409

Ybarra v. Spangard
154 Pac. (2) 687
162 A. L. R. 1267

"There appears to be little question that the doctrine of res ipsa loquitur is inapplicable in malpractice actions when its invocation is sought solely upon the fact that the treatment was unsuccessful or terminated with poor or unfortunate results, and this conclusion is but in accord with, or resulting from, the universally recognized propositions that the mere fact of a poor or unsuccessful result does not raise a presumption of negligence, does not establish a prima facie case, and does not shift to the defendant the necessity

of carrying the burden of proof or going forward with the evidence."

162 A. L. R. 1267

"In cases where the physicians or surgeons lack of skill or of care is so gross as to be within the comprehension of laymen and to require only common knowledge and experience to understand and judge it, expert evidence is not required."

141 A. L. R. 12.

Again calling the court's attention to *Engelking v. Carlson*, supra, the California court in speaking of the doctrine said:

"If this were the rule as a practical proposition, no surgeon could ever operate without being an insurer of a medically satisfactory result. * * Probably in every operation there is some hazard which the medical profession recognizes and guards against but which is not always overcome. To say that the doctrine of res ipsa loquitur allows the recovery of damages in every case where an injury does not ordinarily occur, would place a burden on the medical profession which the law has not hitherto laid upon it. Moreover, such a rule is not justified by either reason or authority."

While the appellant's brief does not contain any legal proposition to the effect that he invoked the doctrine of res ipsa loquitur, the argument and the entire brief indicates an attempt to do so. Such an attempt is of necessity inspired by desperation on the part of the appellant, for, unless the doctrine

does apply, appellant's counsel must realize that his case has fallen. We will not indulge in any extended argument on this proposition. We rest with the firm conviction that the law in that respect is stated in our proposition number "B" and that the authorities cited in support thereof clearly demonstrate that the doctrine of res ipsa loquitur is not applicable in this case.

It therefore follows of necessity that the only part the testimony of the appellant and the other lay witnesses play in this case is to bring forth such facts upon which expert testimony could be based.

E. THE DOCTRINE OF RES IPSA LIQUITOR HAS NO APPLICATION WHERE ALL THE FACTS AND CIRCUMSTANCES APPEAR IN EVIDENCE.

> "The doctrine of res ipsa loquitur has no application where all the facts and circumstances appear in evidence. Nothing is then left to inference and the necessity for the doctrine does not exist. Being a rule of necessity, it must be invoked only where evidence is absent and not readily available, and certainly not when it is actually presented. Nor has it any application where the cause of the accident is known and is not in question. Circumstances in addition to the bare physical cause of injury, attending an accident, sometimes supply the necessary circumstantial affirmative evidence to carry the case to the jury upon

the question of the defendant's negligence, and obviate the necessity of invoking the distinctive rule of res ipsa loquitur. Also, the circumstances may negative the inference of negligence or disclose that due care was used. It has been said that where there is the slightest evidence to explain the happening of the occurrence upon any theory other than that of the negligence claimed, the jury should disregard the inference arising from the fact of injury. * * * or does it apply where an unexplained accident may be attributable to one of several causes, for some of which the defendant is not responsible. It should not be allowed to apply where, on proof of the occurrence, without more, the matter still rests on conjecture alone or the accident is just as reasonably attributable to other causes as to negligence. In other words, if the facts and circumstances of the occurrence give rise to conflicting inferences, one leading to the conclusion of due care and the other to the conclusion of negligence, the doctrine does not apply."

38 Am. Jur. p. 997, Sec. 303.

APPELLANT'S OPENING BRIEF

Appellant's complete failure to set forth the facts of this case in the opening brief necessitated a far longer brief on the part of the appellee than is ordinarily required.

We have no quarrel whatsoever with the rule alluded to in Point "A" of appellant's argument that

the trial court on a motion to dismiss should consider the evidence in the light most favorable to the plaintiff. Under the argument, pages 11 to 19, the appellant has not pointed to one scintilla of medical testimony to support his contention that he should not have been non-suited, that is, under the Federal practice that the court should not have dismissed his cause. We have fully answered appellant's proposition "A" by our proposition "B".

Appellant's Point "B", page 19, of the brief contains nothing but Hornbook law, with which no one has any quarrel. The entire and complete answer is that the appellant failed to produce any evidence whatsoever to show that Dr. McGrath was either negligent in his treatment or that he was unskillful or negligent in applying his skill. Quite to the contrary, the appellant by the evidence of her witness Dr. Coates brought out very forcibly that the appellee, Dr. McGrath, followed the recognized practice of medicine in the vicinity of Weiser in the care of the appellant.

Likewise, appellant by her attending surgeon, Dr. Loutzenheiser, confirmed the treatment of Dr. McGrath, even to the point that it is often necessary to "compromise with what was accepted procedure in order to save the life of my patient."

Point "C" of appellant's brief deals with the requirement of the use of xray films in diagnosing. Again the cited cases reveal nothing but abstract principles of law. Every doctor called by appellant

as a witness supported the actions and treatment of Dr. McGrath and not one physician testified that a different course should have been followed. In fact, it is recalled the eminent Dr. Loutzenheiser, said repeatedly 'treat the patient as a whole—the xrays in their time.'

On page 30 of appellant's brief a point is made of the question of damages; the statement starts "Where malpractice is alleged and *proved* * * *" that in our view is as far as we need go with the proposition. We do not understand the courts will concern themselves with moot questions. Until a party *proves* malpractice the rest is entirely immaterial and beside the point. There would be no purpose in offering evidence of out-of-the-pocket expense or damages if that was all there was to offer.

CONCLUSION

We whole-heartedly agree that the right of trial by jury is a fundamental feature of our Federal jurisdiction protected by the Seventh Amendment of the Constitution and we would be the last to contend otherwise. We are sure that counsel for the appellant in this case has heard before "Please Mr. Lazarus, 'pin-point' the evidence which you contend is sufficient to take this case to the jury." We again request of our good friend that if there is any testimony in this case justifying the submission of the case to the jury, that he "pin-point" it, not only for us, but for this court.

As stated in 7 *Wigmore on Evidence*, supra:

"* * * the plaintiff in such an action often prefers to rest his case upon the mere fact of his sufferings, and to rely upon the jury's untutored sympathies without attempting specifically to evidence the defendants' unskillfulness as the cause of these sufferings. * * *"

DATED: Boise, Idaho, November 30, 1955.

Respectfully submitted,

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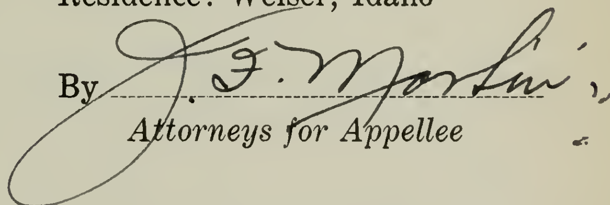

By ....

Attorneys for Appellee